UNDERWRITING CREDIT CARDS, OVERWRITING CONGRESS, AND REWRITING FAMILY LAW: THE TREATMENT OF HOUSEHOLD INCOME IN CONSUMER LENDING

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INTRODUCTION

A new Federal Reserve rule prevents many stay-at-home mothers and homemakers from opening sole-account credit cards or extending their existing credit lines.[1] The rule, promulgated by the Board of Governors of the Federal Reserve ("Board") in an effort to implement the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("CARD Act"),[2] requires card issuers to consider only a person's independent income, and not the household's income, when underwriting credit cards. However, this "ability to pay" rule impacts not only young adults—the intended target of the CARD Act—but also, problematically, an even larger group of people[3]: non-income earning spouses, largely comprised of stay-at-home mothers and homemakers.[4]

While the Board's rule does not necessarily reflect any particular or reasoned assault on stay-at-home mothers or homemakers, it does indicate the vulnerability of certain family members in a new era of credit-tightening and budget-cutting. In responding to the economic crisis, therefore, lawmakers should be mindful of the negative or unintended consequences of their legislation on the family unit and its members.[5]

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[1] *See* Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (codified in scattered sections of 15 U.S.C.); 12 C.F.R. § 226.51 (2012); *see infra* Parts I.C, II, and note 131. An iteration of this issue previously arose in the debate regarding the propriety of a bride's decision to keep her maiden name and the consequent impact on her credit history. *See, e.g.*, Esther Suarez, Note, *A Woman's Freedom to Choose Her Surname: Is It Really a Matter of Choice?*, 18 WOMEN'S RTS. L. REP. 233, 236–37 (1997).

[2] 123 Stat. 1734.

[3] U.S. CENSUS BUREAU, U.S. DEP'T. OF COMMERCE, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2006, at tbl. FG2, *available at* http://www.census.gov/population/www/socdemo/hh-fam/cps2006.html.

[4] *See infra* Part II.B. It has been argued that women, non-working spouses, military members, military spouses, and retired people would have more trouble accessing the credit card market under the Board's "ability to pay" rule. Manley Williams & Sara E. Emley, *CARD Act's Ability to Pay Proposal Ignites Public Policy Debate*, 60 AM. U. L. REV. 1417, 1429 (2011).

[5] However, there are reasons to believe that Congress did not intend the CARD Act to hold negative consequences for women and that the Board's "ability to pay" rule is not a permissible construction of the statute. *See infra* Parts I.C, III.A.1.

Women's interests, in particular, must be considered in any discussion sensitive to the undesirable consequences of economic legislation.[6] Women continue to earn less than their male counterparts and have historically lacked contractual rights in economic matters.[7] Many of the inequities women encounter, including the newest one that would bar many of them from the credit card market, have stemmed from their erratic presence in the labor market due to childbearing and rearing.[8]

One solution has been the law's frequent treatment of the family as a single economic unit, which has minimized the consequences of a spouse's decision to enter or exit the labor market.[9] This unified treatment of the family has been one of the underlying principles of many fields of law, as well as one of the benefits of marriage. Prominent areas of law that conform to this principle are tax law,[10] trusts and estates law,[11] matrimonial property law,[12] and divorce law[13]—all of which recognize spouses as one economic unit.[14] Such treatment is not to pity or patronize the non-income earning spouse; instead, it is the result of the recognition of the non-financial contribution of a non-income

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[6] *See* Bryce Covert, *The Double-Edged Sword of Credit Cards for Women and Minorities*, HUFFINGTON POST (Mar. 16, 2011, 11:00 AM), http://www.huffingtonpost.com/bryce-covert/the-double-edged-sword-of_b_836499.html ("Indeed, minorities and women have historically been shut out of the products others take for granted. And this problem was one of the excuses used by the industry to deregulate and 'democratize' credit. But as access to credit and banking expanded, so did predatory practices. As the CFPB tries to rein them in, it risks shutting people out all over again.").

[7] *See infra* Part II.B.

[8] *See id.*

[9] *See infra* Part II.A.

[10] The incentives in the U.S. Tax Code are for married couples to file their federal taxes jointly instead of separately. Margaret Ryznar, *To Work, or Not To Work? The Immortal Tax Disincentives for Married Women*, 13 LEWIS & CLARK L. REV. 921, 927 n.27, 928 (2009).

[11] *See infra* note 137 and accompanying text.

[12] The general family law principle is that a spouse's income is marital property. Margaret Ryznar, *All's Fair in Love and War: But What About in Divorce? The Fairness of Property Division in American and English Big Money Divorce Cases*, 86 N.D. L. REV. 115, 125 (2010); *see also infra* notes 143–51 and accompanying text.

[13] *See* Ryznar, *supra* note 12.

[14] *See infra* Part II.A; *see also* Suarez, *supra* note 1, at 236.

earning spouse, as well as society's respect for the couple's decision to share an income and society's decision not to interfere in a married couple's financial arrangement.[15]

The Board's "ability to pay" rule, on the other hand, does not treat spouses as a single economic unit. Instead, the rule creates consequences for foregoing an independent income during marriage: The non-income-earning spouse may not open a sole-account credit card, while the income-earning spouse may do so.[16] Although the new rule is consistent with mortgage lending policies that do not permit reliance on an income whose earner has not signed for the loan, this similarity is less necessary given that credit card loans are smaller and more incremental loans than mortgages.[17] Furthermore, in limiting credit in this way, the Board's "ability to pay" rule was not rooted in any empirical data suggesting that non-income earners are higher risk creditors.[18] On the contrary, it has been suggested that non-income earners are the fiscal managers of the household and a major purchasing power.[19]

The practical implications of the Board's "ability to pay" rule are as problematic as the theoretical concerns regarding spousal inequity. Specifically, financial inclusion is essential for any adult,[20] especially in emergency situations when a spouse needs to leave an abusive partner.[21] Even in an amicable marriage separation, the non-income spouse may need to rely on marital

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[15] Indeed, many spouses elect to income-share. *See* Williams & Emley, *supra* note 4, at 1423–24.

[16] *Access to Credit for Spouses Who Work in the Home*, INDEP. CMTY. BANKERS OF AM. (June 6, 2012) [hereinafter *Access to Credit for Spouses Who Work in the Home*], *available at* http://www.icba.org/files/ICBASites/PDFs/test060612.pdf.

[17] *See, e.g.*, Press Release, Bd. of Governors of the Fed. Reserve Sys. (Apr. 19, 2011), *available at* http://www.federalreserve.gov/newsevents/press/bcreg/20110419a.htm.

[18] *See Access to Credit for Spouses Who Work in the Home*, *supra* note 16 ("A substantive change such as this should be supported by consumer testing, industry outreach, and data sufficient to demonstrate that it is in the best interest of consumers.").

[19] *See infra* notes 193–98, 236 and accompanying text.

[20] Judith L. Ritter, *Growin' Up: An Assessment of Adult Self-Image in Clincial Law Students*, 44 AKRON L. REV. 137, 144 (2011) (noting that emerging adults say that adulthood is characterized by financial independence).

[21] An abused spouse may decide to stay with an abusive spouse for financial reasons. Pami Vyas, *Reconceptualizing Domestic Violence in India: Economic Abuse and the Need for Broad Statutory Interpretation To Promote Women's Fundamental Rights*, 13 MICH. J. GENDER & L. 177, 200–201 (2006); *see also infra* Part II.B.

credit before the marital assets are divided or become liquid.[22] During marriage, meanwhile, people with military spouses need access to credit card markets.[23]

Perhaps most importantly, financial independence is self-perpetuating, with the proper use of a credit card being recognized as an important step in building credit.[24] In a society with consistently high divorce rates,[25] it is important for both spouses to build their credits separately, even if they are managing only one income during the marriage.[26]

Of course, financial independence must be earned, and credit cards are risky for those unable to be financially independent.[27] Credit card interest can be high, terms can be complicated, and debt can overwhelm those unable to pay.[28] For many of these reasons, Congress passed the CARD Act to protect consumers.[29] The Board's resulting bar on many non-income earners from the credit market, however, is a surprising interpretation because the Act's strictest credit restriction targets young people under the age of twenty-one rather than non-income-earning spouses.[30]

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[22] *See generally* Ryznar, *supra* note 12. In some divorce cases, the income-earning spouse may be court-ordered to pay for the legal fees of a non-income-earning spouse. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-324 (2012); MINN. STAT. ANN. § 518.14 (West 2012).

[23] Press Release, Congresswoman Shelley Moore Capito, Capito Opening Statement at Financial Services Subcommittee Hearing (June 6, 2012), *available at* http://capito.house.gov/press-releases/capito-opening-statement-at-financial-services-subcommittee-hearing8/.

[24] *See* Wayne Jekot, Note, *Over the Limit: The Case for Increased Regulation of Credit Cards for College Students*, 5 CONN. PUB. INT. L.J. 109, 117 (2005) ("[T]he use of a credit card builds a credit history and credit score which are required to qualify for other types of credit such as a mortgage or a car loan."). Conversely, the improper use of a credit card lowers one's credit rating. *See* Creola Johnson, *Maxed Out College Students: A Call To Limit Credit Card Solicitations on College Campuses*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 191, 215 (2005).

[25] *See, e.g.*, *Marriage and Divorce*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/fastats/divorce.htm/ (last updated Mar. 29, 2012).

[26] *But see* Williams & Emley, *supra* note 4, at 1425 ("[M]any consumer advocates have warned against individuals combining their credit profiles.").

[27] *See infra* notes 44–45 and accompanying text.

[28] *See, e.g.*, Katherine M. Porter, *Life After Debt: Understanding the Credit Restraint of Bankruptcy Debtors*, 18 AM. BANKR. INST. L. REV. 1, 33–34 (2010).

[29] Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (codified in scattered sections of 15 U.S.C.); *see infra* Part I.C.

[30] *See infra* Parts I.C, III.A.1.

This Article therefore argues that the Board's rule should not seek to influence, penalize, or interfere with a household's decision to income-share between spouses. This argument applies to all non-income-earning spouses—regardless of gender—even though the rule, despite being facially neutral, disproportionately affects women.[31] There are additional legal infirmities plaguing the rule, including vulnerabilities under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[32] All of these considerations should be at the forefront of any reevaluation of the rule, especially as pressure mounts for the newly established Consumer Financial Protection Bureau ("CFPB") to review the rule after it took jurisdiction over such matters on July 21, 2011.[33]

Part I of this Article begins by considering the origins of the Board's rule—reviewing the legal and economic frameworks governing them. Part II then examines the position of families and women in this framework, noting that many other fields of law take an opposite approach and treat spouses as a single economic unit. Part III, in addition to highlighting the constitutional concerns regarding the Board's rule, concludes that there is no value in barring women from the credit market—only high costs—and argues that the amended rule should instead recognize the non-income-earning spouse's financial participation in the household.

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[31] *See infra* Part II.B.

[32] *See* 467 U.S. 837, 842–43 (1984); *see also infra* Part III.A.1.

[33] *See An Examination of the Federal Reserve's Final Rule on the CARD Act's "Abilty To Repay" Requirement, Hearing Before the H. Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.*, 112th Cong. 5–6 (2012) (statement of Gail Hillebrand, Assoc. Dir., Consumer Fin. Prot. Bureau) [hereinafter *Testimony of Gail Hillebrand*], *available at* http://financialservices.house.gov/uploadedfiles/112-133.pdf; *infra* notes 121–26 and accompanying text. However, recently filed lawsuits against the CFPB—which remains relatively controversial—could decrease the agency's power over the Board's rule. *See* Emmanuel Olaoye, *Suit Against U.S. Consumer Financial Protection Bureau Could Force It To Define Limits to Its Authority, Says Banking Industry Lawyer*, REUTERS (June 29, 2012), http://blogs.reuters.com/financial-regulatory-forum/2012/06/29/suit-against-u-s-consumer-financial-protection-bureau-could-force-it-to-define-limits-to-its-authority-says-banking-industry-lawyer/; *see also* C. Boyden Gray & Jim R. Purcell, *Why Dodd-Frank Is Unconstitutional*, WALL ST. J., June 21, 2012, at A17, *available at* http://online.wsj.com/article/SB10001424052702304765304577480451892603234.html?mod=googlenews_wsj (discussing the constitutionality of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), which legislatively underpins the CFPB).

I. THE ORIGINS OF THE FEDERAL RESERVE RULE

Given the law's frequent treatment of the family as a single economic unit, as well as the negative impact of the Board's "ability to pay" rule on many women,[34] it is difficult to justify barring married non-income earners from the credit card market. One compelling explanation for the Board's rule—which does exactly this—is that the Board misstated and misinterpreted congressional intent in the CARD Act, which aims to protect young consumers in the credit card market.[35] Before considering this legislation, it is helpful to consider the credit crisis prompting it.

A. *The Credit Crisis*

The Board's "ability to pay" rule stems from the financial reform prompted by the "Great Recession."[36] This recession, which began in 2007, has been among the most devastating economic crises of the past hundred years.[37] Unemployment hovered at nine percent,[38] and families affected by unemployment lost their homes in foreclosures, as well as their savings when the stock market lost its value.[39]

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[34] *See infra* Part II.

[35] *See infra* Parts I.C, III.A.1.

[36] *See* Barak Y. Orbach et al., *Arming States' Rights: Federalism, Private Lawmakers, and the Battering Ram Strategy*, 52 ARIZ. L. REV. 1161, 1171 n.36 (2010).

[37] *See* Andrew J. Ceresney et al., *Regulatory Investigations and the Credit Crisis: The Search for Villains*, 46 AM. CRIM. L. REV. 225, 225 (2009) ("Many commentators have remarked that 2008 will be known as the modern financial system's *annus horribilis*."). It has been called "the worst financial crisis since the Great Depression." *Id.* at 228–29 (quoting *IMF's Financial General Plots Strategy to End the Credit Crisis*, TELEGRAPH (Apr. 14, 2008, 12:01 AM), http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/2788081/IMFs-financial-general-plots-strategy-to-end-the-credit-crisis.html.

[38] *See, e.g.*, Andrew J. Kazakes, Developments in the Law, *Protecting Absent Stakeholders in Foreclosure Litigation: The Foreclosure Crisis, Mortgage Modification, and State Court Responses*, 43 LOY. L.A. L. REV. 1383, 1393 & n.42 (2010); *Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, http://data.bls.gov/timeseries/LNS14000000 (last visited Aug. 18, 2013).

[39] *See* Kazakes, *supra* note 38, at 1392–93 (footnotes omitted) ("In the second quarter of 2009, the national rate of residential mortgages either delinquent or in foreclosure rose to a record-high 13.16 percent, or more than one in eight households with a mortgage. In total, out of the approximately 51 million mortgaged residential units in the United States, approximately 2.15 million foreclosures were completed

Underpinning this recession was the credit crisis caused by excessive extension of credit in both the commercial and consumer fields, leading to defaults and the consequent tightening of credit.[40] The catalysts of the credit crisis included "[t]he proliferation of subprime adjustable-rate mortgages, the ensuing pandemic of defaults in the subprime sector, and the collapse of the housing market."[41] Many people were therefore able to obtain credit too easily—often against their houses—even when they could not afford it. They then defaulted on their loans, drying up credit.[42] A major source of consumer loans is the credit card market, considered next.

B. *The History of the Credit Card Market*

Credit cards have been described as "one of the great innovations of the twentieth century,"[43] whose benefits include easiness, flexibility, and the opportunity for better financial management.[44] At the same time, credit cards have also been seen as risky for consumers due to their high interest rates and propensity for encouraging consumers to spend more or live beyond their means.[45]

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from July 2007 to October 2009. Looking to the horizon, foreclosure starts are projected to reach eight to thirteen million by 2013.").

[40] *See, e.g.*, Randall D. Guynn, *The Global Financial Crisis and Proposed Regulatory Reform*, 2010 BYU L. REV. 421, 430.

[41] Ceresney et al., *supra* note 37, at 230.

[42] *See* Guynn, *supra* note 40 ("Although the final word on who or what caused the financial crisis has not been written, this financial crisis has followed a similar pattern that almost every other mania, panic, and crash has followed before this one. Some combination of cheap credit and excessive optimism creates a bubble in asset prices, typically in real estate or commodities. Eventually this bubble pops, resulting in a collapse in asset prices, a spike in interest rates, extreme uncertainty about 'true' asset values, and excessive pessimism . . . . The recent global financial crisis was triggered by a collapse in U.S. real estate prices at a time when U.S. households, corporations, and financial institutions had built up huge levels of debt leverage.").

[43] Timothy J. Muris, *Payment Card Regulation and the (Mis)Application of the Economics of Two-Sided Markets*, 2005 COLUM. BUS. L. REV. 515, 515 (2005).

[44] *See id.* at 524–28.

[45] *See* Angela Littwin, *Testing the Substitution Hypothesis: Would Credit Card Regulations Force Low-Income Borrowers into Less Desirable Lending Alternatives?*, 2009 U. ILL. L. REV. 403, 426 (2009) ("Several studies have shown a correlation between using credit cards and spending more.").

Credit card lending has resulted in substantial consumer debt for many Americans.[46] There are currently "1.22 billion credit cards in the United States,"[47] with the average person possessing five credit cards.[48] By the end of 2009, credit card debt and other unsecured revolving consumer credit owed in the United States totaled $866 billion.[49] This represented "a five-fold increase in just three decades."[50]

The modern credit card grew out of merchant credit schemes for fuel or department store purchases.[51] The mainstream use of credit cards began in 1958, when Bank of America and American Express issued their first credit cards.[52] Prior to their broad availability, credit cards were developed to accommodate well-to-do consumers traveling on corporate expense accounts.[53]

Since then, over the course of the last fifty years, credit card companies have become quite successful at marketing. In 2008, for example, Mastercard launched its Diamond Credit Card, which costs $1,000 per year to maintain and has a $50,000 credit limit.[54] It was inlaid with a 0.02 carat diamond and laced with gold.[55] Illustrating the marketing nuances, the card had a picture of a winged horse for men or a peacock for women.[56]

Credit cards were also successfully marketed to the less wealthy, such as college students. Credit card companies would attain students' contact information and send them pre-screened

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[46] John Infranca, *Safer than the Mattress? Protecting Social Security Benefits from Bank Freezes and Garnishments*, 83 ST. JOHN'S L. REV. 1127, 1133 (2009).

[47] Kathryn A. Wood, Note, *Credit Card Accountability Responsibility and Disclosure Act of 2009: Protecting Young Consumers or Impinging on Their Financial Freedom?*, 5 BROOK. J. CORP. FIN. & COM. L. 159, 159 (2010).

[48] *Id.*

[49] Song Han et al., *Credit Supply to Personal Bankruptcy Filers: Evidence from Credit Card Mailings* 1 (Fin. & Econ. Discussion Series, Working Paper 29, 2011), *available at* http://www.federalreserve.gov/pubs/feds/2011/201129/201129pap.pdf.

[50] *Id.*

[51] SATYAJIT DAS, EXTREME MONEY: MASTERS OF THE UNIVERSE AND THE CULT OF RISK 71 (2011).

[52] *Id.*

[53] *See* Littwin, *supra* note 45, at 427–28.

[54] DAS, *supra* note 51, at 72.

[55] *Id.*

[56] *Id.*

credit card offers.[57] They would also come to campus and offer free gifts, such as pizzas or hats, to entice students to sign up for credit cards.[58]

In the 2000's, public concern mounted about the targeting of college students by the credit card industry.[59] Fifty-six percent of students opened their first credit card at the age of eighteen, and, by their final year in university, ninety-one percent had at least one credit card, and fifty-six percent had at least four credit cards.[60] Upon graduation, students' credit card debt ranged from $2,200 to $4,100.[61] Over seventy percent of students retained their first credit card beyond university.[62]

Partially due to this successful marketing,[63] credit cards have become widely used,[64] especially among students.[65] This is a problem mainly to the extent that people may not be able to afford their monthly balances. This kind of credit is expensive, and it is easy to ruin a credit score through the improper use of credit cards, especially for college students who may not understand the terms.[66] As these concerns became increasingly public during the recession,[67] Congress turned to legislating on the topic.

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[57] Regina Hinson, Note, *Credit Card Reform Goes to College*, 14 N.C. BANKING INST. 287, 296 (2010).

[58] *Id.* at 292 & n.47 (noting that many students used to receive free t-shirts and pizza for engaging with credit card companies).

[59] *See, e.g.*, Kimberly M. Gartner & Elizabeth R. Schiltz, *What's Your Score? Educating College Students About Credit Card Debt*, 24 ST. LOUIS U. PUB. L. REV. 401, 401 (2005) ("Observers have expressed concern about burgeoning credit card debt loads which, when combined with already-high student loan burdens, can force students into quitting college, declaring bankruptcy, and even, in a few tragic cases, suicide."); Johnson, *supra* note 24, at 193–94 (noting that some students may be driven to suicide by their credit card debts). The Federal Reserve did not adequately foresee this problem. *See infra* note 76.

[60] Wood, *supra* note 47, at 161.

[61] *Id.* at 159–60.

[62] *Id.* at 160.

[63] *See* Han et al., *supra* note 49, at 10–11 ("According to the aggregate statistics obtained from Mintel, monthly credit card mail solicitations plummeted from a peak of 600 million in 2006 to just 100 million in 2008. By the start of our sample, solicitations had recovered to roughly 300 million per month.").

[64] *See supra* notes 46–50 and accompanying text.

[65] Williams & Emley, *supra* note 4, at 1418.

[66] *See supra* note 59.

[67] Williams & Emley, *supra* note 4, at 1418. ("Credit card companies were among the chief targets of consumer and media criticism during the peak of the credit crisis. They were accused of perceived wrongs ranging from increases in

C. *The Resulting Legal Framework*

As a response to the economic recession,[68] Congress targeted the financial services industry, which was thought to have been extending credit too easily.[69] The resulting legislative reform of the financial services industry was sweeping, aiming to prevent future credit crises created by lax underwriting.[70]

As part of the financial reform,[71] Congress took aim at the credit card industry[72] in the CARD Act,[73] which President Barack

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interest rates to undesired reductions in credit limits and high fees for overlimit spending and late payments.").

[68] *See supra* Parts I.A–B.

[69] *See* Ceresney et al., *supra* note 37, at 227 (underscoring fraudulent lending practices); David Smith, *The Credit Card Act of 2009*, 47 HOUS. LAW. 28, 29 (2010) (noting that Congress was reacting to pressure to "do something"); Charles K. Whitehead, *Reframing Financial Regulation*, 90 B.U. L. REV. 1, 2 (2010) (suggesting "[f]inancial regulation is often reactive.").

[70] *See* Elizabeth R. Schiltz, *The Paradox of the Global and the Local in the Financial Crisis of 2008: Applying the Lessons of* Caritas in Veritate *to the Regulation of Consumer Credit in the United States and the European Union*, 26 J.L. & RELIGION 173, 183 (2010) ("Indeed, the perception that lax regulation of consumer credit contributed to the explosion in subprime credit that precipitated the global economic crisis has led to significant federal *re*-regulation of consumer credit."); *see also* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); Wulf A. Kaal & Richard W. Painter, *Initial Reflections on an Evolving Standard: Constraints on Risk Taking by Directors and Officers in Germany and the United States*, 40 SETON HALL L. REV. 1433, 1482 (2010); *infra* note 71. This expansion of government regulation has not been without controversy. *See* Robert Higgs, *Culminating Policy Consequences, Frightened Overreactions, and the Current Surge of Government's Size, Scope, and Power*, 33 HARV. J.L. & PUB. POL'Y 531, 531 (2010).

[71] Included in these financial reforms was also the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). *See* Schiltz, *supra* note 70, at 183 ("The more recent Dodd-Frank law sets the framework for even more significant substantive federal regulation of consumer credit, the exact scope of which will unfold gradually over the next few years."). For further background on the Dodd-Frank law, see generally Linda Singer et al., *Breaking Down Financial Reform: A Summary of the Major Consumer Protection Portions of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 14 J. CONSUMER & COM. L. 2 (2010). For a discussion of potential future legislation regulating financial services, see Michael Edwards, *The Changing Landscape of Financial Services Law in 2009: Federal Preemption, Credit Rating Agency Liability, and Regulatory Reform Legislation*, 6 BUS. L. BRIEF (AM. U.) 27, 31–32 (2010).

[72] *See supra* Part I.B. For a criticism of the regulation of the credit card market, see generally Muris, *supra* note 43.

[73] Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (codified in scattered sections of 15 U.S.C.).

Obama signed into law on May 22, 2009.[74] To carry out the CARD Act and its amendments, Congress had assigned power, through the Truth in Lending Act's Regulation Z, to the Federal Reserve Board to issue such rules and publish such model forms as it considered necessary.[75] The Board's interpretation of the CARD Act yielded its "ability to pay" rule.[76]

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[74] *See* Mechele Dickerson, *Vanishing Financial Freedom*, 61 ALA. L. REV. 1079, 1087 (2010) (noting three failed Congressional attempts in passing the CARD Act). For further background on the CARD Act, see generally Mary Beth Matthews, *The Credit CARD Act of 2009—What Is It, and What Does It Do?*, 2010 ARK. L. NOTES 65.

[75] 15 U.S.C. § 1602 (2006 & Supp. IV 2010); Regulation Z, 12 C.F.R. § 226.1(a) (2012). Such an assignment is typical, but some commentators were concerned by the provision of so much power to the Federal Reserve Board without Congressional oversight. Roberta S. Karmel, *The Controversy over Systemic Risk Regulation*, 35 BROOK. J. INT'L L. 823, 833 (2010); *see also* Schiltz, *supra* note 70, at 179 (noting that the regulation of consumer credit had previously been a matter of primarily state power). *But see Modernizing Consumer Protection in the Financial Regulatory System: Strengthening Credit Card Protections: Two ABI Members Testify Before U.S. Senate Banking, Housing and Urban Affairs Committee*, AM. BANKR. INST. J., Mar. 2009, at 10, 76 [hereinafter *Modernizing Consumer Protection*] ("Congress is not well-suited for determining whether every innovation of the card industry should be permitted or not . . . .").

[76] Yet, the Federal Reserve had not been entirely successful in determining which subgroups need protection in the credit card market. In 2001, for example, Federal Reserve staff noted that bank examinations did not focus on college students' credit cards because the banks typically examined the risk of the credit card portfolio as a whole and did not examine subgroups of card holders—especially at banks where the credit card portfolio was a minor portion of their financial business. U.S. GEN. ACCOUNTABILITY OFFICE, CONSUMER FINANCE: COLLEGE STUDENTS AND CREDIT CARDS 7 (2001), *available at* http://www.gao.gov/new.items/d01773.pdf. These officials further stated that college student credit card portfolios have not been viewed as especially risky, even at banks whose primary business was issuing credit cards. *Id. But see* Johnson, *supra* note 24, at 217–218 (suggesting that credit card debt may contribute to the increase of young adult bankruptcies). "Bankruptcy is becoming more common for young adults; the number of people under the age of twenty-six who filed for bankruptcy tripled between 1995 and 2000. According to Harvard University's Consumer Bankruptcy Project, approximately 100,000 debtors in their twenties filed for bankruptcy in 2001." *Id.* at 218 (footnote omitted). Meanwhile, the Federal Reserve Board wants to restrict access to the credit card market for non-income-earning spouses, despite no evidence that this group is high-risk. *See supra* note 18 and accompanying text; *infra* notes 196–99 and accompanying text.

1. The Card Act

The Card Act aimed to increase the transparency of the credit card industry and protect college students from predatory lending.[77] Specifically, title I of the CARD Act addressed consumer protections,[78] while title II enhanced consumer disclosures.[79] Title III sought to protect credit card consumers under the age of twenty-one[80]: Credit card companies could no longer give gifts to students to sign up for credit cards on campus,[81] and universities had to disclose contracts signed with credit card companies that gave access to students.[82] Although some commentators wanted more protections for young people,[83] title III was a major success compared to previous failed efforts to protect college students from aggressive credit card lending, which included U.S. Representative Louise Slaughter's bill on the topic in 1999, as well as Senator Christopher Dodd's bill in 2000.[84] Finally, title IV of the CARD Act concerned gift cards,[85] while title V had miscellaneous provisions.[86]

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[77] 15 U.S.C. § 1650 (2006 & Supp. IV 2010) (outlining provisions for credit card protections for college students); *id.* § 1693l-1 (2006 & Supp. IV 2010); *see also* Schiltz, *supra* note 70, at 183 (noting that the CARD Act "imposed substantive restrictions on the ability of credit card issuers to increase interest rates and to impose late fees and over-limit fees, and restricts fees on subprime, low-limit credit cards").

[78] Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, tit. I, 123 Stat. 1734, 1735–43 (codified in scattered sections of 15 U.S.C.).

[79] *Id.* tit. II, 123 Stat. at 1743–47.

[80] *Id.* tit. III, 123 Stat. at 1747–54.

[81] *Id.* tit. III, § 304, 123 Stat. at 1749.

[82] *Id.*

[83] It has been argued that the CARD Act does not fundamentally address the problems surrounding young people's use of credit cards and that financial literacy would be more helpful. Wood, *supra* note 47, at 183 ("Restricting young adult ownership of credit cards only delays credit misuse; it does not solve it. The Act should not be aimed at discouraging all use, but rather encouraging responsible use."); *see also* Howell E. Jackson & Stacy A. Anderson, *Can States Tax National Banks To Educate Consumers About Predatory Lending Practices?*, 30 HARV. J.L. & PUB. POL'Y 831, 844 (2007). *But see* Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197, 197–98 (2008) (noting that financial literacy may worsen people's practices with credit cards). Others have supported the various legislative efforts to curb aggressive lending to college students. *See, e.g.*, Johnson, *supra* note 24, at 216.

[84] Johnson, *supra* note 24, at 253–55.

[85] *See* tit. IV, 123 Stat. at 1751–54.

[86] *Id.* tit. V, 123 Stat. at 1754–66.

The CARD Act provisions that were most relevant to the Board's "ability to pay" rule were the ones amending the Truth in Lending Act ("TILA").[87] The particular amendments that served as the foundation for the Board's "ability to pay" rule were the following: (1) CARD Act section 301, which added section 127(c) to TILA and (2) CARD Act section 109, which added section 150 to TILA.[88] The Board's interpretation of these amendments resulted in its "ability to pay" rule.[89]

Importantly, section 301 of the CARD Act—which added section 127(c) to TILA—is the *only* reference to a consumer's "independent means" to pay, from which the Board's "ability to pay" rule for everyone derives.[90] However, title III of the CARD Act—entitled "Protection of Young Consumers"—explicitly addresses *only* young consumers under the age of twenty-one.[91] Specifically, the application for a credit card by a consumer under twenty-one requires an appropriate cosigner, or "submission by the consumer of financial information, including through an application, indicating an *independent* means of repaying any obligation arising from the proposed extension of credit in connection with the account."[92]

On the other hand, section 109 of the CARD Act—outside of title III and therefore encompassing all consumers—adds section 150 to TILA and has no similar requirement for an independent means of income.[93] The key requirement here is a general ability to pay:

> A card issuer may not open any credit card account for any consumer under an open end consumer credit plan, or increase any credit limit applicable to such account, unless the card issuer considers the ability of the consumer to make the required payments under the terms of such account.[94]

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[87] *Id.* §§ 109, 301, 123 Stat. at 1743, 1747; *see also* Williams & Emley, *supra* note 4, at 1421. For Congressional testimony in support of the CARD Act, see *Modernizing Consumer Protection*, *supra* note 75.

[88] §§ 109, 301, 123 Stat. at 1743, 1747.

[89] *See* Truth in Lending, 75 Fed. Reg. 67,458, 67,474 (Nov. 2, 2010), *available at* http://edocket.access.gpo.gov/2010/pdf/2010-26515.pdf.

[90] § 301, 123 Stat. at 1748.

[91] *Id.* tit. III, 123 Stat. at 1747–48.

[92] *Id.* § 301, 123 Stat. at 1748 (emphasis added).

[93] *Id.* § 109, 123 Stat. at 1743.

[94] *Id.*

Given that the only instance of the "independent means" to pay language is in title III of the CARD Act—which relates only to young consumers under the age of twenty-one—Congress intended to require an independent income only of credit card applicants under the age of twenty-one. Congresswomen Maloney and Slaughter, in their response to the Board, confirmed that this was the intent of the CARD Act:

> The original intent of the "ability to pay" requirement was to ensure that underage consumers couldn't apply for credit cards using their parents [sic] income without having a means on their own to make payments on the card. Creating a uniform standard for underage consumers and for spouses who do not earn a salary goes beyond that intent. For this reason, we believe that there should be two different standards for assessing income, one for consumers under age 21 and one for everyone else.[95]

In other words, the congressional intent of the CARD Act was to protect young people from credit card costs risks, not to bar non-income-earning spouses from the credit card market.

The Board conceded that Congress's use of the word "independent" in TILA section 127(c)(8)(B)(ii) (added by section 310 of the CARD Act), but not in TILA section 150 (added by section 109 of the CARD Act), could have been viewed as establishing a different and "less stringent standard" for household income when the consumer is over twenty-one years of age.[96] However, the Board rejected this interpretation:

> TILA Section 150 requires card issuers to consider "the ability of *the consumer* to make the required payments," which indicates that Congress intended card issuers to base this evaluation only on the ability of the consumer (or consumers) applying for the account. Indeed, to the extent that TILA Section 150 was intended to ensure that credit cards are not issued to consumers who lack the ability to pay, it could be inconsistent with that purpose to permit a card issuer to open a credit card account for a consumer without income or assets

[95] Letter From Reps. Carolyn B. Maloney & Louise Slaughter to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. (Jan. 12, 2011), [hereinafter Letter From Reps. Carolyn B. Maloney & Louise Slaughter to Jennifer J. Johnson], *available at* http://maloney.house.gov/sites/maloney.house.gov/files/documents/financial/creditcards/20110112AbilitytoPayCommentFedLetter.pdf.

[96] Truth in Lending, *supra* note 89.

based on the income or assets of a spouse or other household member (unless the consumer has an ownership interest in the household income or assets).[97]

The Board therefore "concluded that it would be inconsistent with the intent of the Credit Card Act for a card issuer to issue a credit card to a consumer who does not have any income or assets."[98]

In sum, the Board's interpretation of congressional intent in the CARD Act was that the independent income of every consumer was to be evaluated, not just that of young people. The Board concluded that this "ability to pay" standard necessarily excluded consideration of the consumer's spousal income and assets in evaluating the consumer's ability to pay, regardless of the consumer's age. This resulted in the bar on non-income-earning spouses from the credit card market.

2. The Federal Reserve's "Ability To Pay" Rule

The Board proceeded to draft rules to implement its interpretation of the CARD Act. On February 22, 2010 and June 29, 2010, the rules were published in the Federal Register, amending Regulation Z's provisions that apply to open-end—not home-secured—credit plans.[99]

Interestingly, in its initial rule on ability to pay, the Board used the word "independent" in section 226.51(b) of Regulation Z, but not in section 226.51(a), which could be interpreted "as prohibiting consideration of household income with respect to underage consumers but permitting it for other consumers."[100] In other words, the initial rule was perceived as having an "ability to pay" standard focused only on young adults.

In November 2010, however, the Board announced clarifications regarding the final rules, proposing to amend specific portions of the regulations and the attendant official staff commentary.[101] In these clarifications, the Board noted that the

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[97] *Id.*

[98] *Id.*

[99] Truth in Lending, 75 Fed. Reg. 44,093, 44,093 (July 28, 2010), *available at* http://www.gpo.gov/fdsys/pkg/FR-2010-07-28/pdf/2010-18410.pdf; Truth in Lending, 75 Fed. Reg. 7657, 7722 (Feb. 22, 2010), *available at* http://www.gpo.gov/fdsys/pkg/FR-2010-02-22/pdf/FR-2010-02-22.pdf.

[100] Truth in Lending, *supra* note 89.

[101] *Id.*

difference in the use of the term "independent" in the two subsections of section 226.51 was in fact due to the difference in the legislative provisions being implemented, but that the result was the same: Household income could not be considered for any person.[102] Therefore, the Board clarified that the credit standards for those under twenty-one years of age and those over twenty-one were the same—an independent income was required to apply for a credit card. Any difference in the Board's language in the initial rule between these two groups was not intended to establish two different "ability to pay" standards.

To this end, the Board, using its authority under TILA section 105(a) and section 2 of the CARD Act, proposed amending section 226.51 of its rules to require that "regardless of the consumer's age, a card issuer must consider the consumer's *independent* ability to make the required payments."[103] In other words, only one "ability to pay" standard applied to everyone: Spouses received no preferential financial treatment over children; all were to be evaluated for credit only by their individual income rather than by their household income.

Accordingly, section 226.51(a) of the Board's rules, which requires credit card issuers to consider only a consumer's individual ability to make the required payments, reflects the provision in TILA section 150 as added by section 109 of the CARD Act.[104] Meanwhile, section 226.51(b), which requires a card issuer to acquire financial information indicating an underage consumer has an independent ability to make the payments, tracks TILA section 127(c)(8)(B)(ii), as added by section 310 of the CARD Act.[105]

In accordance with this approach, the Board also proposed revising comment 51(a)(1)–4 to its rules, clarifying that consideration of the consumer's household income or assets generally does not fulfill the requirement in section 226.51(a)(1), which requires that a card issuer consider the consumer's independent ability to pay.[106] In practical terms, if the credit

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[102] *Id.* The differences in the statutory provisions are discussed *supra* Part I.C.1; *infra* III.A.1.

[103] Truth in Lending, *supra* note 89.

[104] *Id.*

[105] *Id.*

[106] *Id.*

card application asks an applicant to provide "household income," the card issuer would need to obtain additional information about the consumer's independent income, which may include contacting the consumer.[107] On the other hand, if the credit card application asks only for "income"—instead of "household income"—the card issuer may rely on the applicant's stated income to issue credit, even if it inadvertently includes spousal income: "[T]he comment would also clarify that, if a card issuer requests on its application form that applicants provide their income (without referring to household income), the card issuer may rely on the information provided to satisfy the requirements of § 226.51(a)."[108] The result is that credit card applications may ask for income without specifying "independent" income, but may not ask for "household income."

Perhaps because of these semantics, the Board noted that it "is unaware of any evidence that card issuers who request 'income' or 'salary' extend less credit to married women who do not work outside the home or to low-income families than issuers that request 'household income.' "[109] Nonetheless, the Board did recognize the impact of the rule on non-income-earning spouses, stating in its clarifications:

> The Board acknowledges that the proposed amendments to § 226.51 and its commentary could prevent a consumer without income or assets from opening a credit card account despite the fact that the consumer has access to (but not an ownership interest in) the income or assets of a spouse or other household member.[110]

The implicit acknowledgment was that certain stay-at-home mothers and other non-income-earning spouses may lack access to the credit card market without their spouses' co-signatures.[111]

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[107] *Id.*

[108] *Id.*; *see also Testimony of Gail Hillebrand*, *supra* note 33, at 6, 10–11.

[109] Truth in Lending, 76 Fed. Reg. 22,948, 22,976 (Apr. 25, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-04-25/pdf/2011-8843.pdf. The CFPB is awaiting data on this point. *See infra* note 199 and accompanying text. However, it has been pointed out that there are few credit card applications that ask for "income" rather than "household income," and thus little evidence exists on this question. J. Craig Shearman, *NRF Says New Regulations Could Make Credit More Difficult for Stay-at-Home Spouses*, NAT'L RETAIL FED'N (Mar. 23, 2011), http://www.nrf.com/modules.php?name=Newsletter&op=viewlive&sp_id=324&id=51.

[110] Truth in Lending, *supra* note 89.

[111] *See infra* notes 114–15 and accompanying text; *see also infra* Part II.B.

However, there are exceptions to the Board's "ability to pay" rule if "the spouse or household member is a joint applicant or accountholder or state law grants the applicant an ownership interest in the income of his or her spouse."[112] This latter exception applies only in the nine community property states, wherein non-income earning spouses can open sole-account credit cards, because they own part of their spouses' income according to the states' matrimonial property regimes.[113]

The remainder of American non-income-earning spouses—in the majority of states—must establish a joint credit card with their income-earning spouses, because they have no ownership interest in spousal income.[114] According to the Board, in these common law states, "a consumer without independent income or assets could still open a credit card account by applying jointly with a spouse or household member who has sufficient income or assets."[115] Yet, the Board reasoned that its approach provides a "single, consistent standard for evaluating a consumer's ability to pay," in addition to being consistent with the intent of TILA section 150, as added by the CARD Act.[116]

The proposed Board rules were published in the Federal Register on November 2, 2010.[117] The Board held a comments period until January 3, 2011,[118] soliciting "comment on whether it would be appropriate to provide greater flexibility in these

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[112] Truth in Lending, *supra* note 89. State law "grants the applicant an ownership interest in the income of his or her spouse" in community property states, where, by statutory default, ownership of marital property is shared equally by the spouses regardless of which spouse acquired the property. *See id.*; Alicia Brokars Kelly, *Money Matters in Marriage: Unmasking Interdependence in Ongoing Spousal Economic Relations*, 47 U. LOUISVILLE L. REV. 113, 156 (2008); *infra* notes 143–47 and accompanying text. Therefore, "[i]f the consumer and the spouse reside in a community property state where state law grants the consumer joint ownership of income or assets acquired by the spouse during the marriage, the income or assets are considered the consumer's income or assets for purposes of the § 226.51(a) analysis." Truth in Lending, *supra* note 89.

[113] *See infra* notes 143–47 and accompanying text.

[114] *See infra* notes 148–51 and accompanying text.

[115] Truth in Lending, *supra* note 89.

[116] *Id.*

[117] *Id.* at 67,458.

[118] *Id.* For some of the publicly available comments, scattered throughout the Federal Register, on the proposed rules, see Truth in Lending, *supra* note 89; *see also supra* note 95 and accompanying text; *infra* notes 161, 201, 211, 219 and accompanying text.

circumstances."[119] Despite numerous comments urging reconsideration of the proposed rules,[120] the Board did not change the rules on this topic, and they went into effect on October 1, 2011.

Upon its establishment on July 21, 2011, the Consumer Financial Protection Bureau inherited the Board's rules.[121] Certain members of Congress, including principal authors of the CARD Act, have called on the CFPB to study and report the impact of the Board's "ability to pay" rule, particularly on non-income-earning spouses.[122] The Board has agreed that such a study would be helpful in assessing the "unintended consequences" of the rule.[123] In a June 6, 2012 hearing of the House Financial Services Subcommittee on Financial Institutions and Consumer Credit, the CFPB Associate Director testified that the agency had recently requested card issuers to share data regarding the actual impact of the Board's "ability to pay" rule.[124] The Associate Director also testified that the CFPB held a public comments period in the first half of 2012.[125] Contributing to the public comments, a stay-at-home mother delivered to the CFPB over 30,000 signatures petitioning against

[119] Truth in Lending, *supra* note 89.

[120] *See, e.g.*, Williams & Emley, *supra* note 4, at 1419, 1422–26.

[121] Press Release, Congresswoman Carolyn B. Maloney, Reps. Maloney, Slaughter, Bachus, and Frank Call on CFPB to Study Impact of Credit CARD Act's "Ability to Pay" Rules (Dec. 7, 2011), *available at* http://maloney.house.gov/press-release/reps-maloney-slaughter-bachus-and-frank-call-cfpb-study-impact-credit-card-act's-. For background on the CFPB, see Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010). For questions regarding the authority of the CFPB to make any binding decisions given the controversial appointment of its director, see Videotape: *Holding the CFPB Accountable: Review of First Semi-Annual Report: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 112th Cong. (2012) (statement of Sen. Mike Johanns), *available at* http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=82edc25b-2459-4806-9a30-a01bdc24da8b. However, the CFPB may, at some point, lose power over the Board's rule. See *supra* note 33.

[122] Press Release, Congresswoman Carolyn B. Maloney, *supra* note 121.

[123] *Id.*

[124] *Testimony of Gail Hillebrand*, *supra* note 33, at 7.

[125] *Id.* at 6.

the rule.[126] Despite this public concern, however, the Board's "ability to pay" rule bars non-income earning spouses from the credit market.[127]

II. THE TENSION BETWEEN THE FEDERAL RESERVE'S RULE AND THE LAW'S TRADITIONAL TREATMENT OF SPOUSES AS AN ECONOMIC UNIT

The Board's "ability to pay" rule must be reviewed for several reasons. Chief among them is that the rule problematically conflicts with several principles deemed important in society and law, including the typical treatment of the spouses as one economic unit. Many areas of law treat the spouses in this way,[128] but especially family law. The notion of the spousal economic unit in family law is evidenced by the duty to support one's spouse, the doctrine of necessaries, the principles governing matrimonial property, and property division upon divorce, which treats spouses' income as marital property.[129]

In light of lawmakers' and the public's demands for the CFPB to study the effects of the Board's rule,[130] any consideration of the rule should be mindful of the law's traditional treatment of the spouses as a single economic unit. This is particularly important given that such treatment provides spouses with a certain measure of financial independence and protection facilitated by pooling economic resources without consequence; during the marriage, spouses may rely on each other financially, and after the marriage, such reliance is not penalized. In addition to negatively impacting the spousal unit, however, the Board's bar on such pooling affects women disproportionately.

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[126] Blake Ellis, *Stay-at-Home Mom Fights New Credit Card Rule*, CNNMONEY (May 16, 2012), http://money.cnn.com/2012/05/16/pf/credit-cards-stay-at-home-moms/index.htm.

[127] *See supra* Part II.B.

[128] *See supra* notes 10–14 and accompanying text; *infra* Part II.A.

[129] *See infra* Part II.A.

[130] *See supra* notes 121–26 and accompanying text.

A. *The Spouses as an Economic Unit*

Spouses have long been treated as a single economic unit under the law.[131] The inconsistency of this policy with the Board's stance makes the "ability to pay" rule not only surprising, but also difficult to accommodate in households otherwise legally permitted—and even incentivized—to have one-income earners.

The reasons for the law's treatment of the spouses as an economic unit are numerous and varied. Importantly, this treatment minimizes the consequences of a spouse's decision to enter or leave the labor market. For example, one spouse is able to accommodate the family's needs through care-taking roles, such as by leaving the work force to have and raise children, without being jeopardized economically.[132] Approximately one-third of married couples in the United States have such an arrangement, with only one spouse in the labor force,[133] which is financially feasible partially due to the law's typical treatment of the family as a single economic unit.

While it is true that there are more married couples without minor children than with minor children, and there are benefits to a more neutral legal regime, many current areas of law favor the treatment of spouses as a single economic unit, often for child-caring purposes.[134] For example, most married couples

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[131] *See, e.g.*, Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411, 421 (2009) (noting the treatment of family as a single unit in intestacy laws); Kerry A. Ryan, *Human Capital and Transfer Taxation*, 62 OKLA. L. REV. 223, 268 (2010) (noting the treatment of family as a single unit in tax law); Benjamin Shmueli, *Tort Litigation Between Spouses: Let's Meet Somewhere in the Middle*, 15 HARV. NEGOT. L. REV. 195, 205 (2010) (noting the treatment of the family as a single economic unit in torts law).

[132] *See, e.g.*, Ann O'Leary, *How Family Leave Law Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 3 (2007) ("This catchphrase [the "Opt-Out Revolution"] is used to describe highly educated professional women who have chosen to leave their jobs to care for their children or to arrange reduced work hours to have more time at home."); *see also* Joyce P. Jacobsen & Laurence M. Levin, *Effects of Intermittent Labor Force Attachment on Women's Earnings*, MONTHLY LAB. REV., Sept. 1995, at 14, 16 ("Women who leave the work force are more likely to be married and to have children than are their counterparts who remain in the work force."). On the other hand, abstaining from paid work often diminishes human capital. *See infra* note 179.

[133] U.S. CENSUS BUREAU, *supra* note 3, at tbl. FG1.

[134] The number of married women without minor children slightly exceeds those with such children: There are currently 33,059,000 married couples without children

benefit from filing jointly under the federal income tax code.[135] The federal tax code even incentivizes single-income earning couples through the marriage penalty, which results from the lack of double taxation brackets upon marriage and adversely affects many two-income earning couples to the benefit of single-income earning couples.[136]

Furthermore, trusts and estates law has many defaults that benefit the nuclear family. This includes intestacy laws that favor inheritance to the nuclear family,[137] as well as most states' elective share statutes that protect a spouse from disinheritance by allowing that spouse to forego an unfavorable will for a statutorily-determined portion of the estate.[138]

Perhaps the most compelling treatment of the spouses as a single economic unit is in family law. For example, there is a duty to support one's spouse;[139] this is one of most notable differences between marriage and cohabitation. In marriage, the courts may require one spouse to pay a fair and reasonable sum for the other spouse's support, having due regard to the circumstances of the respective parties.[140] Additionally, there is the doctrine of necessaries in family law, which stems from the English common law duty of a husband to provide for the necessary expenses of his wife and child.[141] Under this doctrine, the seller of goods to one spouse may charge the other spouse if the goods are necessary for the beneficiary.[142]

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under eighteen, as opposed to 26,469,000 married couples with minor children. *Id.* at tbl. FG3; *see also supra* note 132 and accompanying text. For the benefits of neutral laws, see Ryznar, *supra* note 10, at 938–41.

135 *See* Ryznar, *supra* note 10, at 938–41.

136 *Id.*

137 *See* JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 73–75 (8th ed. 2009).

138 *See* JESSE DUKEMINIER ET AL., PROPERTY 386–87 (7th ed. 2010).

139 *See, e.g.*, N.Y. FAM. CT. ACT § 412 (McKinney 2012) (citing a duty to support one's spouse); OHIO REV. CODE ANN. § 3103.03 (West 2012) (same).

140 *See, e.g.*, N.Y. FAM. CT. ACT § 412; OHIO REV. CODE ANN. § 3103.03.

141 *See* Forsyth Mem'l Hosp., Inc. v. Chisholm, 467 S.E.2d 88, 89 (N.C. 1996).

142 Susan Kalinka, *Taxation of Community Income: It Is Time for Congress To Override* Poe v. Seaborn, 58 LA. L. REV. 73, 94 (1997) ("Under the doctrine of necessaries, the earning spouse is responsible for payment of expenses incurred by the nonearning spouse for those things that are necessary for the family."). "Necessity" is determined by examining factors such as the spouses' "means, social position, and circumstances." *Id.*

Although these various family law principles do not mandate that non-income-earning spouses must be able to open credit cards in their own names, they do show the law's treatment of the spouses as one economic unit. The most compelling case for the treatment of the spouses as one economic unit, however, is matrimonial property law, as well as divorce law when the courts divide the spouses' property.

In these two areas of law, the nine community property states view marriage as an economic partnership by considering property held within a marriage to be jointly held by the spouses. In these states,[143] marriage is treated as a partnership in which the property and debts acquired during the marriage belong to both spouses, most often, equally.[144] In other words, the income earned by one spouse during the marriage is owned by both.[145] Upon divorce, furthermore, some community property states statutorily require equal division of the marital assets between the spouses upon divorce,[146] although the nuances differ among community property states. The Board has noted that in these states, non-income-earning spouses may count their spouses' income as their own in credit card applications, due to community property principles.[147]

The remaining majority of American states utilize equitable distribution in divorce, and spouses hold their property separately during marriage.[148] "The generally accepted theory of equitable division likens the division of property upon divorce to that of partnership dissolution. While each partner has a stake in the partnership, all shares are not equal."[149] However, if a

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[143] Community property is the default marital property regime in a minority of states, which include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Kelly, *supra* note 112, at 156 n.163; *see also* Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason To Revive an Old Rule*, 53 CLEV. ST. L. REV. 359, 370 (2005–06).

[144] WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 1 (2d ed. 1971).

[145] *Id.*

[146] *See, e.g.*, CAL. FAM. CODE §§ 2550–56 (West 2012).

[147] Truth in Lending, *supra* note 89; *see also supra* notes 112–13 and accompanying text.

[148] *See* Ryznar, *supra* note 12, at 119–20.

[149] *Id.* (footnote omitted) (citing 2 BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY § 8:1 (3d ed. 2005)).

couple should divorce, the marital property is divided, and often each spouse receives a portion of the marital property in recognition of marriage as a partnership.[150]

In this majority of states, non-income earning spouses cannot rely on their spouse's income in credit card applications.[151] The Board's rule therefore creates a consequence in these common law states for a spouse's decision to forego an independent income in favor of relying on the household income: no opportunity to open a sole-account credit card despite the vital importance of access to this form of financial inclusion.[152] This is inconsistent with the law's typical treatment of the family as a single economic unit and incompatible with many households' financial arrangements that rely on income-sharing between the spouses.[153]

Interestingly, the Board's "ability to pay" rule ignores the possibility that spouses may have changed their matrimonial property regime through a premarital agreement.[154] In some jurisdictions, particularly in Europe, premarital agreements are recorded in a public registry, such that creditors know the assets of a loan applicant before lending.[155]

Divorce law, regardless of the state's matrimonial property regime, commonly treats marriage as a single economic unit. For example, many courts in community property states divide marital property equally between the spouses, while common law states have been trending toward almost an equal division, depending on factors such as the length of the marriage.[156] Both approaches acknowledge that marital assets belong to both

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[150] *See generally* Ryznar, *supra* note 12.

[151] Letter From Reps. Carolyn B. Maloney & Louise Slaughter to Jennifer J. Johnson, *supra* note 95 ("The Board states that the consumer can always jointly apply for the card. The Board also notes that in several community property states, both spouses have a joint interest in all of the income and assets in a household and can therefore use that joint interest when applying for credit cards. However, only nine states in the U.S. are community property states, leaving that option available to a small minority of American consumers.").

[152] *See supra* notes 20–26 and accompanying text; *infra* notes 200–08 and accompanying text.

[153] *See supra* Part II.A.

[154] *See* Margaret Ryznar & Anna Stępień-Sporek, *To Have and To Hold, for Richer or Richer: Premarital Agreements in the Comparative Context*, 13 CHAP. L. REV. 27, 31–32 (2009).

[155] *Id.* at 50.

[156] *See* Ryznar, *supra* note 12, at 119–21.

parties, regardless of which spouse earned them.[157] Indeed, it would be rare in any jurisdiction for a stay-at-home mother or homemaker to leave a marriage without any of the marital assets.[158] Therefore, creditors are protected because even if a non-income earning spouse incurred credit card debt, and upon divorce the court assigns the debt to that spouse, the non-income-earning spouse would leave the marriage with assets to pay for the debt.[159] Furthermore, after the divorce, the non-income-earning spouse would have independent assets from the divorce and possibly alimony—which is often determined by the marital standard of living[160]—to apply for a credit card. However, divorce should not be the only way for the non-income-earning spouse to list marital assets on a credit card application; the law should acknowledge shared income well before a divorce.[161]

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[157] *See id.* at 119–20.

[158] *Id.* at 125.

[159] For background on how courts divide debt between spouses, see generally Margaret M. Mahoney, *The Equitable Distribution of Marital Debts*, 79 UMKC L. REV. 445 (2010).

[160] *See, e.g.*, UTAH CODE ANN. § 30-3-5(8)(c) (West 2012) ("As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (8)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage."); Canakaris v. Canakaris, 382 So. 2d 1197, 1201–02 (Fla. 1980) (emphasis added) ("Permanent periodic alimony is used to provide the needs and the necessities of life to a former spouse as they have been established by the marriage of the parties. The two primary elements to be considered when determining permanent periodic alimony are the needs of one spouse for the funds and the ability of the other spouse to provide the necessary funds. The criteria to be used in establishing this need include the parties' earning ability, age, health, education, the duration of the marriage, *the standard of living enjoyed* during its course, and the value of the parties' estates."). However, alimony may be becoming disfavored in certain jurisdictions. *See, e.g.*, Wendy Murphy, *New Alimony Law Is Bad for Women*, CNN (Mar. 9, 2012, 12:35 PM), http://www.cnn.com/2012/03/09/opinion/murphy-alimony-overhaul-con/index.html.

[161] In a comment letter to the Federal Reserve Board, Bank of America has argued that favoring divorced non-income earners over married ones is against public policy. Comment Letter from Stacie E. McGinn, Deputy Gen. Counsel, Consumer & Small Bus. Banking, Bank of Am. Corp., to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. 2 (Jan. 3, 2011), *available at* http://www.federalreserve.gov/SECRS/2011/February/20110201/R-1393/R-1393_010311_59191_570778722245_1.pdf ("Ironically, if the non-working spouse were to divorce, he or she would then be able to list any alimony to meet the independent ability to pay test. So under the proposed rule, the non-working spouse is more

In an intact marriage, on the other hand, the courts are reluctant to become involved, and the spouses arrange their finances privately.[162] In their private arrangements, many households elect to income share—which the Board's "ability to pay" rule does not recognize—likely due to the significant benefits of income-sharing under other areas of the law.[163] The Board should also be respectful of people's choices if they do not impact their credit-worthiness.[164]

Finally, there are many nuances in property division upon divorce that illustrate the entwined nature of the spouses' property. For example, separate property may become marital property by being commingled through joint spousal use.[165] Illustrating this is a Rhode Island case in which the husband inherited furniture from his father, with the inheritance making it the husband's separate property.[166] He placed some of it in storage and some of it in his marital home.[167] Upon divorce, the court awarded him the furniture from storage, but the wife received the furniture in the marital home because they used it jointly.[168] These family law principles illustrate how spouses are treated as a single economic unit, which the Board's "ability to pay" rule fails to do.

Some may argue that the Board's "ability to pay" rule in fact does treat the spouses as one economic unit by requiring them to co-sign for a credit card in common law property states.[169]

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qualified for credit when divorced and dependent on alimony than when married and maintaining a shared household. We believe that such as [sic] result would be contrary to public policy, and contrary to the purpose of the Federal Reserve Board's own guidance in section 202.10 of Regulation B.").

[162] For example, one married couple could not agree on the education of the child and brought the case to court, but the Alabama Supreme Court held that it had no jurisdiction in "the settlement of a difference of opinion between parents as to what is best for their minor child when the parents and child are all living together as a family group." Kilgrow v. Kilgrow, 107 So. 2d 885, 888–89 (Ala. 1958), *superseded by statute*, ALA. CODE § 30-3-151(2) (2012).

[163] *See supra* notes 134–42 and accompanying text.

[164] *See supra* notes 131–33 and accompanying text.

[165] *See* J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 FAM. L.Q. 219, 226 (1989).

[166] Quinn v. Quinn, 512 A.2d 848, 850 (R.I. 1986).

[167] *Id.* at 850–52.

[168] *Id.* at 851.

[169] For background on common law states, see *supra* notes 148–53 and accompanying text.

However, the Board's rule does not require a non-income-earning spouse to co-sign with an income-earning spouse, just vice versa. Therefore, the rule shifts the bargaining power to the income-earning spouse, and the spouses are not treated as an economic unit because the economic power between them is different.[170]

The conflict between the Board's rule and family law principles is problematic for more than theoretical reasons: Family law principles are developed to protect family members. For example, the principles allow spouses to pool their resources to more effectively form a family.[171] They also allow spouses to leave abusive marriages without worrying about leaving all property behind.[172] The Board's rule hinders these goals, not only unfavorably treating the spouses, but also disproportionately impacting women.

B. *Women Under the Federal Reserve's Rule*

It is true that the Board's "ability to pay" rule is facially neutral in requiring that only the independent income of an applicant, and not of the household, be considered by credit card issuers.[173] The arguments against the rule therefore implicate not only wives without an independent income, but also husbands without an independent income.[174] Even in households with two income-earning spouses, income is often pooled and shared between the spouses, yet the lower-income spouse may be less credit-worthy under the Board's rule.[175]

However, the Board's "ability to pay" rule impacts women disproportionately because, in most households, it is the husband that earns the sole, or more substantial, income. In approximately 22.4% of all married couples, only the husband participates in the labor force.[176] Meanwhile, only in 6.43% of

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[170] This is particularly an issue in abusive family situations. *See supra* notes 20–26 and accompanying text; *infra* notes 200–08 and accompanying text.

[171] *See supra* Part II.A.

[172] *See supra* notes 20–26 and accompanying text; *infra* notes 200–08 and accompanying text.

[173] *See supra* Part I.C. *But see infra* notes 174–78, 196–99 and accompanying text; Part III.A.2.

[174] The arguments particularly apply to military members, military spouses, and retired people. *See supra* note 4.

[175] Williams & Emley, *supra* note 4, at 1423–24.

[176] *See* U.S. CENSUS BUREAU, *supra* note 3.

households is it the wife who is the sole-income earner.[177] Among those employed, men continue to outearn women in the labor force.[178]

Women are often the non- or lesser-income earning spouse due to parenthood.[179] Women, to accommodate their children, take part-time and flexible jobs more frequently than men.[180] Furthermore, maternity leave is far more popular and institutionalized than paternity leave.[181] The decision to

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[177] *See id.*; *see also* Debra DiMaggio, *The "Prodigious Spouse": Equitable Distribution and Wealthy Wage Earner*, 91 ILL. B.J. 460, 464 (2003) ("The stereotype of the nonwage-earning spouse is a woman who does not work outside the home. However, increasing numbers of women are the heads of household and even more women work outside the home.").

[178] *See infra* note 182. The wife out-earns the husband in only about a quarter of married households. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CHARTING THE U.S. LABOR MARKET IN 2006, chart 6-5 (2007), *available at* http://www.bls.gov/cps/labor2006/chartbook.pdf. Although more men than women lost jobs in the economic recession beginning in 2007, men have recovered jobs more quickly than women. Deborah L. Jacobs, *"Mancession" Fades as More Men Than Women Find Jobs*, FORBES (Dec. 6, 2011, 3:58 PM), http://www.forbes.com/sites/deborahljacobs/2011/12/06/economic-recovery-is-gender-biased-study-suggests/.

[179] For a summary of the labor market challenges mothers face, including lower wages, see Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1359, 1361 (2007). On the other hand, abstaining from paid work often diminishes human capital. *See* Jacobsen & Levin, *supra* note 132, at 14 ("First, women who leave the labor force and later re-enter do not build up seniority, which, by itself, often leads to higher wages. Second, women who return to the labor force are less likely to receive on-the-job training to increase their productivity and thereby raise their pay. Third, when women are not in the work force, their job skills may depreciate. Finally, employers may view gaps in work history as a signal that women who leave may do so again.").

[180] *See, e.g.*, Marianne Bertrand et al., *Dynamics of the Gender Gap for Young Professionals in the Financial and Corporate Sectors*, AM. ECON. J.: APPLIED ECON., July 2010, at 228, 230–31 (finding that many women curtail their work after having children); Marin Clarkberg & Phyllis Moen, *Understanding the Time-Squeeze: Married Couples' Preferred and Actual Work-Hour Strategies*, 44 AM. BEHAV. SCIENTIST 1115, 1133 (2001) (noting that women, not men, typically prefer part-time work); Alex M. David, *New York City Bar, Law Firm Diversity Benchmarking Report: 2006 Report to Signatories of the Statement of Diversity Principles*, *in* BEYOND DIVERSITY 101: NAVIGATING THE NEW OPPORTUNITIES 213, 235 (2008) (determining that over nine percent of New York City women attorneys work flexibly compared to about one percent of men).

[181] *See, e.g.*, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 730–31 (2003) (summarizing the workplace expectation that women bear the burden of caring for the family); Johnson v. Univ. of Iowa, 408 F. Supp. 2d 728, 743–44 (S.D. Iowa 2004) (determining that an employer's differential treatment of biological fathers and mothers was justified when work leave was characterized as being for disability related to pregnancy, not for caregiving), *aff'd*, 431 F.3d 325 (8th Cir. 2005).

temporarily or permanently leave the workforce, however, is reflected in women's wages and earning power, which have historically been lower than men's.[182]

In addition to these indirect effects of motherhood, women have historically faced many impediments to economic participation. For instance, their ability to contract has been virtually non-existent in much of American history, and women's achievement of full contractual rights is relatively recent.[183] In Texas before 1911, for example, women could not enter into contracts at all, except through the necessities doctrine.[184] Even in the 1950's, women in Texas had limited contract rights, with the district court only able to remove a woman's disability to broaden her contractual powers for mercantile and trading purposes "to the extent of those possessed by a feme sole."[185] One commentator in Texas noted in 1956, "Probably the best course of action would be to abandon our medieval attitude toward the rights and powers of married women and . . . giv[e] a married woman full contractual capacity."[186]

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[182] In 2007, women earned 77.8 cents for every dollar men earned. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, HISTORICAL INCOME TABLES: PEOPLE tbl. P–40, *available at* http://www.census.gov/hhes/www/income/data/historical/people/. Furthermore, in a recent study on the earnings of MBA graduates, researchers found that the major difference in earnings between males and females was caused by several factors, including career interruptions and the difference in hours per week worked between the two groups, with women curtailing their work contributions after having children. Bertrand et al., *supra* note 180. Of course, this does not mean than men outearn their wives in every case. *See supra* note 178.

[183] Gwen Seaquist & Eileen Kelly, *Intentional Infliction of Emotional Distress in Divorce: New York's Reluctance To Enter the Fray*, 10 BUFF. WOMEN'S L.J. 29, 30–31 (2002); Peter D. Edgerton, Comment, *Banishment and the Right To Live Where You Want*, 74 U. CHI. L. REV. 1023, 1034–35 (2007). For a background on the legal constraints that faced women, see Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills* a Jury of Her Peers *Who Appreciate* Trifles, 33 AM. CRIM. L. REV. 229, 252–57 (1996). In terms of women's modern ability to contract, the current debate is mostly restricted to bioethics issues, such as whether women can contract into or out of motherhood in assisted reproduction, including in the case of surrogacy. *See, e.g.*, Mairead Enright, *Dispositional Contracts and Frozen Embryos: Right for Women?*, 12 MEDICO-LEGAL J. IR. 28, 31–32 (2006).

[184] John A. Ward III, Note, *Husband and Wife—Contracts—Married Woman Not Liable on Mercantile or Trading Contract Unless Disability of Coverture Removed*, 34 TEX. L. REV. 1094, 1094 (1956); *see supra* note 142 and accompanying text.

[185] Ward, *supra* note 184.

[186] *Id.* at 1096.

In light of this history, it is even more surprising that the Board promulgated a rule that significantly erodes many women's ability to contract for a credit card. This is especially true given that there is no evidence that stay-at-home mothers and homemakers are more likely to default on their consumer loans than others.[187]

The tendency for women to remain outside the economy and their historical lack of contract rights, especially in economic matters, have been denounced and rejected by nearly all other segments of American society.[188] Additionally, there has been a major international push for the financial inclusion of women in financial matters.[189] In fact, some commentators, both domestically and internationally, have categorized economic abuse in relationships as a form of domestic abuse.[190] Yet, under the Board's "ability to pay" rule, the income earning spouse can block the access of the non-income-earning spouse to the credit card market.[191]

This bar on many women's access to the credit card market is problematic not only for women, but also for the economy.[192] For example, such a bar limits women's ability to participate fully in the economy by hampering their opportunity to open small businesses.[193] The bar also ignores that women have major purchasing power and compose a major portion of consumers, especially at department stores that have their own lines of

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[187] *See* Covert, *supra* note 6 (recounting one woman's experiences attempting to open a credit card in 1973 without her husband as a co-signer); *supra* notes 18–19 and accompanying text; *infra* notes 196–99 and accompanying text.

[188] *See, e.g.*, *infra* notes 232–33 and accompanying text.

[189] Jonathan Sibley & Jeff Liew, *Financial Inclusion in the Pacific: Women's Financial Inclusion Significantly Improves Household Wellbeing*, PAC. FIN. INCLUSION PROGRAMME (PFIP) NOTES SERIES (Dec. 2009), *available at* http://www.undppc.org.fj/_resources/article/files/PFIP%20Note%20-%20Womens%20 Financial%20Inclusion.pdf.

[190] *See, e.g.*, Susan L. Pollet, *Economic Abuse: The Unseen Side of Domestic Violence*, N.Y. ST. B.A. J., Feb. 2011, at 40 (noting this concept domestically); Vyas, *supra* note 21, at 204 (noting this concept internationally).

[191] *See supra* Part I.C.

[192] *See infra* note 236 and accompanying text. However, "[t]he National Consumer Law Center (NCLC), joined by other consumer groups, commented in favor of the [rules], claiming that credit card issuers should be required to only factor in the ability to pay of those consumers liable on the account." Williams & Emley, *supra* note 4, at 1425. For other arguments in favor of the rules, see *id.* at 1425–26.

[193] Suarez, *supra* note 1.

credit.[194] As Congresswomen Maloney and Slaughter stated in response to the Board: "While stay-at-home moms may not be contributing to the market economy as workers, they make the majority of the day-to-day financial decisions on behalf of their household. Women's consumer power represents 73 percent of household spending, or over $4 trillion in annual discretionary spending."[195]

Meanwhile, there is no evidence that non-income-earning spouses default on their consumer loans more than others, and the Board's "ability to pay" rule is not based on any empirical evidence that non-income-earning spouses are high-risk borrowers.[196] There is also no evidence that the soundness of the credit card market requires barring non-income-earning spouses.[197] Credit card companies, of course, would prefer no regulation whatsoever, let alone the regulation of a major low-risk market like non-income-earning spouses.[198] The CFPB is currently seeking data on some of these issues, which will add concrete terms to the debate, although it may be difficult to tell the effects of the Board's rule from the effects of the recession.[199]

Perhaps most problematic, however, is that women might have trouble leaving abusive relationships due to financial reasons, and, once they leave, they may have trouble establishing credit for themselves.[200] Congresswomen Maloney and Slaughter noted this concern in their letter to the Board:

> [R]equiring married women to have their own earnings in order to qualify for credit represents a serious risk for women in abusive domestic partnerships. Women trapped in abusive marriages may be unable to work due to a controlling spouse, a hallmark of relationships characterized by domestic violence.

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[194] *See* Letter From Reps. Carolyn B. Maloney & Louise Slaughter to Jennifer J. Johnson, *supra* note 95.

[195] *Id.*

[196] *Id.* ("Many stay-at-home moms have a strong work history, yet the proposed regulations ignore their demonstrated credit-worthiness because of their lack of current market income."); *see also supra* notes 18–19 and accompanying text.

[197] *See supra* notes 18–19 and accompanying text.

[198] *See* Williams & Emley, *supra* note 4 ("Card issuers are more concerned with whether cardholders have *access to* repayment funds than whether they earn their own income or have *independent* assets."); *see also id.* at 1423; *supra* notes 18–19 and accompanying text; *infra* note 236 and accompanying text.

[199] *See supra* note 124 and accompanying text; *see also supra* Part I.A.

[200] Pollet, *supra* note 190, at 41.

> The availability of an independent credit card may represent her best chance at establishing independence and a path out of a dangerous relationship. By not allowing these women to apply independently for a credit card, the proposed regulations represent a significant—and potentially dangerous—set-back.[201]

However, even during an amicable marriage separation, the non-income-earning spouse may need to rely on the marital credit before receiving part of the marital property.[202] Meanwhile, during marriage, homemakers with military spouses need access to credit card markets.[203]

Importantly, financial independence is self-perpetuating, with the proper use of a credit card building credit.[204] In a society with high divorce rates,[205] and among a widowed population that includes more women than men,[206] it is important for both spouses to build their credits separately.[207] This is especially important given that credit cards are viewed as a desirable alternative to high-cost lenders such as pawn shops and rent-to-own stores.[208]

In sum, the treatment of women by the Board on this issue is unfavorable. Women are disproportionately affected by the Board's "ability to pay" rule because their income is more likely

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[201] Letter From Reps. Carolyn B. Maloney & Louise Slaughter to Jennifer J. Johnson, *supra* note 95. For another argument regarding the situation of women in abusive family situations under the Board's "ability to pay" rule, see Comment Letter from Nessa Feddis, Vice President & Senior Counsel, Ctr. for Regulatory Compliance, Am. Bankers Ass'n, to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. (Jan. 3, 2010) [hereinafter Am. Bankers Ass'n Comment], *available at* http://www.federalreserve.gov/SECRS/2011/February/20110201/R-1393/R-1393_010311_59193_570782784823_1.pdf.

[202] In some divorce cases, the income-earning spouse may be required to pay for the legal fees of a non-income-earning spouse. *See supra* note 22 and accompanying text.

[203] Press Release, Congresswoman Shelley Moore Capito, *supra* note 23.

[204] *See* Jekot, *supra* note 24 ("[T]he use of a credit card builds a credit history and credit score which are required to qualify for other types of credit such as a mortgage or a car loan."). Conversely, the improper use of a credit card lowers one's credit rating. *See* Johnson, *supra* note 24, at 215–16.

[205] *See supra* note 25 and accompanying text.

[206] *See, e.g.*, Jennifer Jones, *Around the Globe, Women Outlive Men*, POPULATION REFERENCE BUREAU (Aug./Sept. 2001), http://www.prb.org/Articles/2001/AroundtheGlobeWomenOutliveMen.aspx.

[207] Williams & Emley, *supra* note 4, at 1425 ("[M]any consumer advocates have warned against individuals combining their credit profiles.").

[208] Littwin, *supra* note 45, at 405. However, these forms of credit may not be perfect substitutes for each other. *Id.* at 425–26.

to be affected by parenthood and other caregiving activities. This is precisely one of the reasons that married couples are treated as one economic unit by many areas of law: to recognize the non-income-earning spouse's contributions to the household. Additionally undermining the Board's rule are constitutional concerns, such as equal protection, as well as potential statutory challenges concerning congressional intent, considered next.

III. LEGAL INFIRMITIES OF THE FEDERAL RESERVE'S RULE AND POTENTIAL REMEDIES

The law's frequent treatment of the family as one economic unit is at odds with the Board's view of household finances, which would result in the bar of a significant contingent of women from the credit card market. In addition to being problematic for these women and the economy,[209] the rule may exceed congressional intent and pose equal protection concerns.

Non-income-earning spouses negatively impacted by the Board's rule may choose to litigate the "ability to pay" rule based on statutory, constitutional, and public policy arguments. People have already started attempting to persuade the CFPB and Congress to amend the rule.[210] There are two simple amendments that can redress these problems: either including age limits or specifying which family members may count household income as their own.

A. *Potential Defects*

There may be certain statutory interpretation issues and constitutional concerns undercutting the Board's "ability to pay" rule. Among these are that the rule may exceed congressional intent and pose equal protection concerns.

1. Statutory Interpretation Issues

One of the principal problems with the "ability to pay" rule is that the Board may well have exceeded congressional intent in interpreting the CARD Act and TILA. This is the argument of

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[209] *See supra* Part II.B.

[210] *See supra* notes 118, 125–26 and accompanying text. *See generally* Letter From Reps. Carolyn B., Maloney & Louise Slaughter to Jennifer J. Johnson, *supra* note 95.

two principal authors of the CARD Act, who, in response to the proposal of the rule, wrote to the Board that they "believe the Fed's proposal goes beyond the intent behind both the specific provisions and the law itself."[211] If the courts agree, then the "ability to pay" rule could be successfully challenged under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[212]

According to *Chevron*:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.
>
> . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[213]

It is unclear whether the Board's "ability to pay" rule would withstand this analysis.

The explicit purpose of the CARD Act is "[t]o amend the Truth in Lending Act to establish fair and transparent practices relating to the extension of credit under an open end consumer credit plan."[214] Notably, the CARD Act did not isolate any group of people—other than young people in title III, for whom household credit must be excluded in credit card applications. The stated intention of title III of the CARD Act—entitled "Protection of Young Consumers"—is to protect young people from deceptive and predatory credit card practices.[215]

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[211] Letter From Reps. Carolyn B. Maloney & Louise Slaughter to Jennifer J. Johnson, *supra* note 95. For another argument using the CARD Act's legislative history against the Board's "ability to pay" rule, see Comment Letter from Richard Whiting, Exec. Dir. & Gen. Counsel, Fin. Servs. Roundtable, to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. (Jan. 3, 2011), *available at* http://www.federalreserve.gov/SECRS/2011/February/20110208/R-1393/R-1393_010311_59189_570777159715_1.pdf. *See also supra* Part I.C.

[212] 467 U.S. 837, 843 (1984); *see infra* notes 217–18 and accompanying text.

[213] *Chevron*, 467 U.S. at 842–43 (footnote omitted).

[214] Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (codified in scattered sections of 15 U.S.C.).

[215] Wood, *supra* note 47, at 160, 163 (noting that, although students view credit cards as helpful in building credit history, they do not understand credit card nuances because they are new customers); *see* tit. III, 123 Stat. 1734 at 1747–49; *supra* Part I.C.

Title III of the CARD Act therefore restricts extending credit to consumers under the age of twenty-one, decreases the ability of credit card issuers to solicit students,[216] protects students from pre-screened offers, and imposes significant disclosure requirements on universities.[217] Most importantly, Congress enacted title III of the CARD Act to specifically restrict credit card lending to young consumers under the age of twenty-one by requiring them to have an ability to repay credit card debt independently of their parents.[218]

Notably, however, the sole placement of the "independent ability to pay" language in the CARD Act is in title III, which relates to young consumers under the age of twenty-one.[219] This indicates that Congress intended for credit card issuers to require an income independent of the household only for consumers under the age of twenty-one. Congresswomen Maloney and Slaughter, in their response to the Board, insist that this was the intent of the CARD Act:

> The original intent of the "ability to pay" requirement was to ensure that underage consumers couldn't apply for credit cards using their parents [sic] income without having a means on their own to make payments on the card. Creating a uniform standard for underage consumers and for spouses who do not earn a salary goes beyond that intent. For this reason, we believe that there should be two different standards for assessing income, one for consumers under age 21 and one for everyone else.[220]

In other words, Congress's intent in the CARD Act was to protect young people from credit card risks, not to bar non-income-earning spouses from the credit card market.

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[216] Wood, *supra* note 47, at 160; tit. III, 123 Stat. 1734. Previously, "[t]his heavy marketing [was] demonstrated by the twenty-five to fifty credit card solicitations students receive[d] per semester." Wood, *supra* note 47, at 163.

[217] Wood, *supra* note 47, at 160; tit. III, 123 Stat. at 1747–49.

[218] In its comment to the Board regarding the Board's "ability to pay" rule, the American Bankers Association suggested that the CARD Act's distinction between consumers under twenty-one and those over twenty-one is because younger consumers are less mature and are less able to handle credit cards. Am. Bankers Ass'n Comment, *supra* note 201.

[219] *See supra* Part I.C.

[220] Letter From Reps. Carolyn B. Maloney & Louise Slaughter to Jennifer J. Johnson, *supra* note 95.

The Board, however, essentially extended these restrictions to all consumers, resulting in the potential bar on non-income-earning spouses from the credit card market.[221] By not recognizing a higher level of protection for young consumers, the Board's rule requires the same significant restrictions to the access of credit for young adults as for non-income earning spouses.

In sum, the only consumers explicitly and unambiguously prevented by the CARD Act from relying on household income in credit card applications are those under the age of twenty-one, and any extension of this restrictive protection to all consumers may exceed congressional intent. The Board's interpretation may therefore be challenged in the courts under *Chevron*: Litigants may argue that the intent of Congress was clear—to establish two different standards for assessing income based on age—and the Board did not give effect to the unambiguously expressed intent of Congress.[222] Alternatively, litigants may argue that Congress's intent was ambiguous with respect to this question, allowing a court to find that the Board's "ability to pay" rule was not based on a permissible construction of the CARD Act.[223]

2. Constitutional Concerns

There may be several equal protection concerns created by the Board's rule as well—although they may be concerns, more so than fatal constitutional defects. Although federal law generally defers to state law characterizations of property,[224] one concern is the differing treatment of women in the nine community property states from those in the remainder of the states. Specifically, the former are able to open single-account credit cards due to access to spousal income, while the latter are not.[225]

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[221] *See supra* Part I.C.

[222] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984); *see supra* Part I.C.1.

[223] *Chevron*, 467 U.S. at 843.

[224] Memorandum from Michael J. Montemurro, Branch Chief, Office of Assoc. Chief Counsel, IRS, to Cheryl Sherwood, Dir., Campus Compliance Servs., IRS, and Brady Bennett, Dir., Compliance, IRS (May 5, 2010), *available at* http://www.irs.gov/pub/irs-wd/1021050.pdf.

[225] *See supra* notes 143–51 and accompanying text.

Previously, the federal tax code's different treatment of households in community property states and those in common law property states prompted public pressure to eliminate the differential treatment, which the IRS did.[226] Public outcry regarding the "ability to pay" rule has started to mount as well[227]—perhaps more slowly because it does not affect the entire household, as in a tax situation, but only the individual women within the households, therefore impacting fewer people. Furthermore, all non-income-earning spouses may not have yet realized their restricted access to credit, as the Board's rule has not been in effect for long.

Another constitutionally problematic aspect of the Board's rule is its indirect impact on non-income-earning women—often stay-at-home mothers and homemakers. Although the rule is facially neutral, it disproportionately affects more women than men.[228] However, this indirect result may not be entirely sufficient for an equal protection challenge, as the Supreme Court has previously applied the equal protection clause only to actions with discriminatory intent.[229]

Nonetheless, while equal protection concerns may be insufficient for judicial intervention—especially under the doctrine of constitutional avoidance[230]—they may be sufficient for the CFPB to reconsider the Board's "ability to pay" rule.[231] Meanwhile, lawsuits might be launched because the evaluation

[226] The uproar regarding the differing treatment of households in community and common law property states resulted in the Revenue Act of 1948, which extended many of the tax advantages to all American households. JAMES H. BOYD ET AL., WEST FEDERAL TAXATION: INDIVIDUAL INCOME TAXES 1–30 (William H. Hoffman, Jr. et al. eds., 2008 ed.).

[227] *See supra* notes 33, 118, 125–26 and accompanying text.

[228] *See supra* Part II.B.

[229] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 238–39 (1976); Margo Kaplan, *"A Special Class of Persons": Pregnant Women's Right To Refuse Medical Treatment after* Gonzales v. Carhart, 13 U. PA. J. CONST. L. 145, 197 (2010).

[230] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

[231] *See supra* notes 33, 121–26 and accompanying text.

of independent income under the Board's rule undermines the Equal Credit Opportunity Act and Regulation B,[232] which intend to equalize access to the credit card market.[233]

While the Board's rule is therefore undermined by nuanced and complex statutory and constitutional arguments, the remedy can be simple but must correct the problem of barring non-income-earning spouses from the credit card market.

B. Possible Remedies

Whether or not the Board intended to bar non-income-earning spouses from the credit card market,[234] such a reality has emerged.[235] The mere grant of permission for issuers to consider household income for non-income-earning spouses would be sufficient to solve the problem, prompting issuers to do so, as "[w]omen's consumer power represents 73 percent of household spending, or over $4 trillion in annual discretionary spending."[236] Given this large consumer base, and no evidence that women cost-prohibitively default on credit card loans,[237] credit card issuers would lose significant business in alienating women from the credit card market.

Such a grant of permission can take the form of a simple amendment: The Board's "ability to pay" rule should be amended to require, or at least permit, credit card issuers to take into

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[232] Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (2006 & Supp. IV 2010); Regulation B (Equal Credit Opportunity), 12 C.F.R. §§ 202.1–202.16 (2012).

[233] Williams & Emley, *supra* note 4, at 1428.

[234] This unintentional problem would not be the only unintended consequence of the legislation. *See, e.g.*, Edwards, *supra* note 71, at 32 (noting that the CARD Act required that loan statements be sent to consumers at least twenty-one days in advance of the loan's due date—a requirement that applied not just to credit cards but to all open-ended loan accounts, thus creating compliance problems for some credit unions).

[235] *See supra* Part II.B.

[236] Jeff Landers, *Even Affluent Women May No Longer Be Eligible for Credit Cards*, FORBES (May 10, 2011, 11:02 AM), http://www.forbes.com/sites/jefflanders/2011/05/10/even-affluent-women-may-no-longer-be-eligible-for-credit-cards (quoting Letter From Reps. Carolyn B. Maloney & Louise Slaughter to Jennifer J. Johnson, *supra* note 95).

[237] *See* Letter From Reps. Carolyn B. Maloney & Louise Slaughter to Jennifer J. Johnson, *supra* note 95 ("Many stay-at-home moms have a strong work history, yet the proposed regulations ignore their demonstrated credit-worthiness because of their lack of current market income.").

account the household income of non-income-earning spouses. Whether prompted by litigation, such amendment may occur either by the action of the CFPB[238] or Congress.[239]

The amendment can take various forms. Chief among them are an age limit embedded in the "ability to pay" rule or a specification of the members of the family for whom household income may be counted.

In regards to the first solution, the Board had considered a twenty-one-year-old age limit on its most restrictive provisions but rejected it in the November 2010 clarifications, due to its interpretation of the congressional framework.[240] This rejection should be reconsidered, and an age restriction should be imposed, so as to align with title III of the CARD Act, which itself is restricted to young consumers below the age of twenty-one.[241] Adult credit card consumers would remain unaffected by title III while remaining protected by the remainder of the CARD Act, which does not require independent income for a credit card application.

If an age limit amendment is not considered, a second and more effective solution is to explicitly exempt spouses from having to show income independent of the household on credit card applications, allowing them to rely on spousal income. This solution would more clearly recognize a married couple as a single economic unit and align with many other areas of law that do so.[242] Also, married young people under the age of twenty-one could income share. The Independent Community Bankers of America advocates this type of resolution as well, supporting a "legislative discussion draft which would amend the Truth in Lending Act to provide that, in the case of a married consumer, a

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[238] *See Testimony of Gail Hillebrand*, *supra* note 33, at 5–7 (explaining the steps the CFPB has taken towards evaluating the current "ability to pay" rule and amendments the CFPB has already made to the Board's regulations of the CARD act); *supra* notes 121–26 and accompanying text.

[239] *See* Press Release, Congresswoman Shelley Moore Capito, *supra* note 23 ("If legislative action is necessary, we stand ready to act.").

[240] *See* Truth in Lending, *supra* note 89; *supra* Part I.C.

[241] *See* Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, tit. III, 123 Stat. 1734, 1747–51 (codified in scattered sections of 15 U.S.C.).

[242] *See supra* Part II.A.

card issuer must consider the ability of the consumer and the consumer's spouse, jointly, to make minimum payments under the card agreement."[243]

Under either of these proposed solutions, married non-income earners would be protected from title III's strictest restrictions on access to the credit card market. This result would better align with the legislative framework underpinning the CARD Act, as well as with American public policy and law recognizing the family as a single economic unit. Fortunately, the CFPB Associate Director has recently indicated the agency's willingness to consider a remedy, noting that "[c]oncerns have been raised about the impact that th[e] rule could have on the availability of credit for those who are not employed outside the home" and that the CFPB is "evaluating the regulation that [it] inherited from the Federal Reserve Board."[244] However, until action is taken, married non-income earners remain barred from access to the credit card market.

CONCLUSION

In sum, the economic recession beginning in 2007 impacted much of American society, from individuals to entire industries. One result has been the congressional enactment of massive regulations targeting the financial services industry. Included in these was the CARD Act, which aimed to regulate the credit card market.

The Federal Reserve Board's interpretation and implementation of this congressional legislative framework, pursuant to congressional authority, has resulted in an "ability to pay" rule that would require credit card issuers to consider only a person's independent income, and not the household's income, when underwriting credit cards. However, in addition to keeping credit cards away from young adults—Congress's stated intent of title III of the CARD Act—the rule problematically does the same for a larger group of people: non-income-earning spouses, constituted primarily of stay-at-home mothers and homemakers. This negative impact of the rule on many women requires its

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[243] *Access to Credit for Spouses Who Work in the Home*, *supra* note 16.

[244] *Testimony of Gail Hillebrand*, *supra* note 33, at 6–7. For additional suggested remedies, see *id. But see supra* note 33 (discussing how several recently filed lawsuits could decrease the agency's power over the Board's rule).

reconsideration, particularly in light of the historical exclusion of women's participation in economic affairs, which was rejected long ago in American society and law.

Many of the inequities women have encountered, including the newest one that bars them from the credit card market, have stemmed from their erratic presence in the labor market due to childbearing and rearing. However, the more usual treatment of the family as a single economic unit has minimized the consequences of their decision to enter or leave the labor market. The Federal Reserve Board's rule contradicts this treatment of the household as a single economic unit, creating negative consequences for a spouse's decision to forego an independent income in favor of relying on the household income. Specifically, many of these non-income-earning spouses have no opportunity to open a single-account credit card, despite the vital importance of access to this form of financial inclusion.

This impact of the Federal Reserve Board's "ability to pay" rule requires immediate attention and the CFPB, as well as potential litigants, should heed calls for its review. The rule should especially be reviewed in light of the possibility that it may exceed congressional intent and pose equal protection concerns and in light of the public policy reasons against the rule.

The solution may take the simple form of an amendment: The rule can be amended to require, or at least permit, credit card issuers to take into account the household income of spouses. This can be done by imposing either an age or family relations restriction on the "ability to pay" rule. In the meantime, many married women who do not currently earn an income will problematically be left without access to sole-account credit cards.